

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KEN KIDO, as attorney in fact and trustee for  
MOMOKO KIDO,

Plaintiff,

v.

TRANSAMERICA LIFE INSURANCE  
COMPANY, a foreign corporation organized  
under the laws of the State of Iowa,

Defendant.

CASE NO. C19-1858-JCC

ORDER

This matter comes before the Court on Plaintiff's motion to remand (Dkt. No. 10). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

**I. BACKGROUND**

Plaintiff alleges that his mother was denied long-term care benefits for her stay in an assisted living facility. (Dkt. No. 1-4 at 3-4.) On October 17, 2019, Plaintiff filed an amended complaint in King County Superior Court, asserting claims for breach of contract, bad faith, and breach of the implied covenant of good faith and fair dealing. (*Id.* at 6-8.) Plaintiff seeks compensatory damages, attorney fees, prejudgment interest, exemplary damages, and declaratory relief (*Id.* at 8.) Plaintiff's amended complaint does not specify an amount in controversy. (*Id.*)

1 On November 15, 2019, Defendant removed this action to federal court based on  
2 diversity jurisdiction under 28 U.S.C. § 1332(a). (Dkt. No. 1 at 4.) Defendant’s removal notice  
3 alleges that Defendant is a citizen of Iowa and Plaintiff is a citizen of Washington and thus there  
4 is complete diversity of citizenship. (*Id.* at 2.) Defendant’s removal notice further alleges that  
5 Plaintiff’s claims exceed \$75,000. (*Id.* at 4.) Plaintiff now moves to remand on the ground that  
6 the amount in controversy requirement is not satisfied. (Dkt. No. 10 at 7–8.)

## 7 **II. DISCUSSION**

### 8 **A. Legal Standard**

9 A defendant in a civil action brought in state court may remove that action to federal  
10 court if the amount in controversy is greater than \$75,000 and there is complete diversity of  
11 citizenship among the parties. *See* 28 U.S.C. §§ 1441(a), 1332(a). Once removed, the case can be  
12 remanded to state court for either lack of subject matter jurisdiction or defects in the removal  
13 procedure. *See* 28 U.S.C. § 1447(c). If the amount in controversy is unclear, the defendant must  
14 establish, “by a preponderance of the evidence, that the amount in controversy exceeds the  
15 jurisdictional threshold.” *Urbino v. Orkin Servs. of Cal., Inc.*, 726 F.3d 1118, 1121–22 (9th Cir.  
16 2013). To determine the amount in controversy, courts consider the complaint and the removal  
17 petition, along with “summary-judgment-type evidence relevant to the amount in controversy at  
18 the time of removal.” *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005). There is a  
19 “strong presumption against removal jurisdiction.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th  
20 Cir. 1992).

### 21 **B. Amount in Controversy**

22 It is undisputed that complete diversity exists between the parties to this suit. (Dkt. No. 1-  
23 4 at 1.) The issue presented is thus whether the amount in controversy exceeds \$75,000. The  
24 amount in controversy may include not just actual damages, but also statutorily authorized treble  
25 damages and attorney fees. *See Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1046  
26 n.3 (9th Cir. 2000) (noting that a court must take into account the availability of treble damages);

1 *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998) (holding that statutorily  
2 authorized attorney fees must be included in the amount in controversy).

3 1. Treble Damages

4 Defendant alleges that Plaintiff is implicitly seeking treble damages under the Insurance  
5 Fair Conduct Act (“IFCA”) and the Washington Consumer Protection Act (“CPA”). But there is  
6 no ambiguity in Plaintiff’s complaint—he has not alleged any violations of the IFCA or the CPA  
7 in this suit. (*See generally* Dkt. No. 1-4.) Defendant provide complaints from other cases  
8 litigated by Plaintiff’s attorney against Defendant in which Plaintiff’s attorney claimed violations  
9 of the IFCA and CPA. (Dkt. Nos. 12-1, 12-4, 12-5, 12-6.) Defendant argues that these past  
10 complaints show that Plaintiff intends to seek IFCA and CPA claims in the future and he will  
11 therefore be eligible for treble damages. (Dkt. No. 11 at 12–14.) But Defendant’s argument is  
12 unsupported—and the past complaints show that when Plaintiff’s attorney intends to seek treble  
13 damages under the IFCA or the CPA, he explicitly does so in the complaint. (*See* Dkt. Nos. 12-1,  
14 12-4, 12-5, 12-6.)

15 Further, “a defendant who fails in an attempt to remove on the initial pleadings can file a  
16 removal petition when subsequent pleadings or events reveal a new and different ground for  
17 removal.” *Fritsch v. Swift Transp. Co. of Ariz., LLC*, 899 F.3d 785, 789 (9th Cir. 2018) (internal  
18 quotations omitted). If Plaintiff were to amend the complaint to include an IFCA or CPA claim,  
19 resulting in an amount in controversy greater than \$75,000, Defendant would have the  
20 opportunity to remove the case to federal court within 30 days of receiving notice of that  
21 amendment. *See id.* at 788. Treble damages thus cannot be included in the amount in controversy  
22 in this case.

23 2. Attorney Fees

24 Defendant next argues that (1) if Plaintiff prevails, he will be entitled to attorney fees  
25 under Washington common law, (2) Plaintiff’s future attorney fees should be factored in to the  
26 amount in controversy and, (3) if they are factored in, Plaintiff’s claim exceeds \$75,000.

1 a. *Recovery of Attorney Fees*

2 In Washington, “attorney fees are not recoverable by the prevailing party as costs of  
3 litigation unless the recovery of such fees is permitted by contract, statute, or some recognized  
4 ground in equity.” *McGreevy v. Or. Mut. Ins. Co.*, 904 P.2d 735 n.8 (Wash. 1995). Under the  
5 *Olympic Steamship* doctrine, “an award of fees is required in any legal action where the insurer  
6 compels the insured to assume the burden of legal action, to obtain the full benefit of his  
7 insurance contract.” *Olympic S.S.*, 811 P.2d 673, 681 (Wash. 1991). *Olympic Steamship* allows  
8 for the recovery of attorney fees if the dispute is over whether there is coverage, but not if the  
9 dispute is over the value of a claim. *See Dayton v. Farmers Ins. Grp.*, 876 P.2d 896, 898 (Wash.  
10 1994). “Coverage disputes include both cases in which the issue of any coverage is disputed and  
11 cases in which ‘the extent of the benefit provided by an insurance contract’ is at issue.” *Leingang*  
12 *v. Pierce Cnty. Med. Bureau, Inc.*, 930 P.2d 288, 295 (Wash. 1997) (quoting *McGreevy*, 904  
13 P.2d at 735).

14 b. *Inclusion of Future Attorney Fees to Amount in Controversy*

15 “[T]he amount in controversy includes all relief claimed at the time of removal to which  
16 the plaintiff would be entitled if she prevails.” *Chavez v. JP Morgan Chase & Co.*, 888 F.3d 413,  
17 417 (9th Cir. 2018). Prior to 2018, the Ninth Circuit had not decided whether future attorney fees  
18 could be factored in to the amount in controversy. In 2018, the court settled the issue, holding  
19 that “if the law entitles the plaintiff to future attorneys’ fees if the action succeeds, ‘then there is  
20 no question that future [attorneys’ fees] are “at stake” in the litigation.’” *Fritsch*, 899 F.3d at 793  
21 (quoting *Chavez*, 888 F.3d at 418).

22 *Fritsch* has yet to be applied to a case where attorney fees are available under state  
23 common law. Although some parts of the *Fritsch* opinion contains language that seems to make  
24 the holding specific to attorney fees “under a contract or statute,” *id.* at 788, the bulk of its  
25 analysis indicates the holding applies broadly, *id.* at 793. The Ninth Circuit used similarly  
26 specific language in holding that past attorney fees should be included in the amount in

1 controversy. *See, e.g., Galt*, 142 F.3d at 1156 (“where an underlying statute authorizes an award  
2 of attorneys’ fees . . . such fees may be included in the amount in controversy”). Lower courts in  
3 the Ninth Circuit have interpreted that language to apply broadly to include awards of attorney  
4 fees under common law in the amount in controversy. *See, e.g., Zidell Marine Corp. v. Beneficial*  
5 *Fire and Cas. Ins. Co.*, Case No. C03-05131-RBL, Dkt. No. 223 at 10–11 (W.D. Wash. 2003);  
6 *Surber v. Reliance Nat. Indem. Co.*, 110 F. Supp. 2d 1227, 1232 (N.D. Cal. 2000). *Fritsch*  
7 provides no indication that common law fees should be treated any differently than those  
8 awarded under a statute or contract. *See Fritsch*, 899 F.3d at 794. Thus, Plaintiff’s claim for  
9 attorney fees, both current and future, must be included in the amount in controversy.

10 *c. Calculating Attorney Fees*

11 In removal cases, district courts exercise discretion to evaluate whether defendants have  
12 met their burden and can “determine when a fee estimate is too speculative because of the  
13 likelihood of a prompt settlement.” *Fritsch*, 899 F.3d at 795. When evaluating requests for  
14 attorney fees, district courts employ a two-step process to calculate a reasonable fee award.  
15 *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000). First, the Court calculates the  
16 lodestar figure, which represents the number of hours reasonably expended on the litigation  
17 multiplied by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Second,  
18 the Court determines whether to increase or reduce that figure based on several factors that are  
19 not subsumed in the lodestar calculation. *Kelly v. Wengler*, 822 F.3d 1085, 1099 (9th Cir. 2016).

20 It is undisputed in this case that Plaintiff’s attorney’s hourly rate is \$425. (*See* Dkt. Nos.  
21 11 at 16, 12 at 4, 12-7 at 3.) The Court shall assume for the purposes of this motion only that this  
22 is a reasonable hourly rate. Defendant argues that Plaintiff’s attorney is expected to spend 250–  
23 400 hours working on this case. (Dkt. Nos. 11 at 16–17, 12 at 3.) To support its estimate,  
24 Defendant submitted a minute order and a declaration from a class action suit in which Plaintiff’s  
25 attorney requested fees as sanctions. (Dkt. Nos. 12-7, 12-8.) Both documents showed that  
26 Plaintiff’s attorney was awarded fees of just over \$17,000—nowhere close to the \$106,250

1 alleged by Defendant or even the approximately \$45,000 required to satisfy the amount in  
2 controversy in this case. (Dkt. Nos. 12-7 at 56, 12-8 at 2.) Defense counsel also provided a  
3 declaration asserting that based on her experience in similar cases, she expected Plaintiff's  
4 attorney to spend 250 hours through discovery and dispositive motions and 400 hours through  
5 trial. (Dkt. No. 12 at 4-5.) Plaintiff's declaration, on the other hand, argues that he does not  
6 intend to spend more than 75 hours on this case. (Dkt. No. 17 at 3.) No other documents were  
7 provided by Defendant to support its estimate of future attorney fees of over \$100,000.

8 Defendant has failed to meet its burden to demonstrate by a preponderance of the  
9 evidence that Plaintiff's attorney will spend the requisite number of hours to meet the amount in  
10 controversy requirement in this case. *See Urbino*, 726 F.3d at 1121-22.

### 11 **III. CONCLUSION**

12 For the foregoing reasons, Plaintiff's motion to remand (Dkt. No. 10) is GRANTED. The  
13 Clerk is DIRECTED to remand this case to King County Superior Court.

14 DATED this 28th day of January 2020.

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18 John C. Coughenour  
19 UNITED STATES DISTRICT JUDGE  
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